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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 470.

ILLINOIS COMMERCE COMMISSION, ET AL., *Petitioners*,

v.

GREAT LAKES ELEVATOR CORPORATION, ET AL., *Respondents*.

BRIEF FILED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 156 Fed. 2d, page 33.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary association embracing within its membership the members of the regulatory commissions

and boards of the several states of the United States except two, one of which has no state regulatory commission.

By the constitution of the Association, the President of the Association may direct the General Solicitor to appear on behalf of the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President, appearance on behalf of the Association should be made. This brief is offered for filing on behalf of said Association by direction of the President, in the general public interest.

STATEMENT OF THE CASE.

The Illinois Commerce Commission (hereinafter called the Commission), one of the petitioners herein, is an agency of State government of the State of Illinois, existing under the provisions of the laws of the State of Illinois, and having jurisdiction over public utility companies, including warehousmen, operating within that State.

The respondents are engaged in the business of the public storage of grain for hire at Chicago, Illinois. Most of the grain stored by respondents is received from, or shipped to, States other than Illinois. (R. 59-77). Respondents conduct their respective warehousing businesses under authority of licenses issued by the Secretary of Agriculture of the United States hereinafter called the Secretary, pursuant to the United States Warehouse Act,[1] and under a schedule of rates, charges and practices duly filed with the Secretary, as required by the federal act.

Daniel F. Rice & Company (hereinafter called Rice), an Illinois partnership, is an owner, shipper and dealer in grain in the State of Illinois, and is, and for some years past has been, a customer of respondent warehousemen, storing grain in the elevators maintained by respondents and paying grain storage and warehousing charges thereon.

[1] Tit. 7 U. S. C., Secs. 241-73.

On July 28, 1944, Rice filed with the Commission a complaint against the respondents in this case, and the respondent (Board of Trade of the City of Chicago) in No. 471, October Term, 1946, alleging violations of the Public Utility Act and the Ilinois Grain Warehouse Act of the State of Illinois. In Paragraph 13 of the Rice complaint it is charged that all or some of the respondents have violated the laws of the State of Illinois in the following particulars: charging unjust, unreasonable, and discriminatory rates; pursuing discriminatory practices; operating without a state license; failing to secure Commission approval of contracts and security issues; mixing public grain with grain of different grades; failing to file, print and publish schedules of rates and charges; and abandoning service without Commission approval. (R. 21)

On August 30, 1944, respondents filed with the Commission their joint motion to dismiss (a) the complaint in its entirety, or (b) in the alternative, each of the separate charging paragraphs of the complaint. The stated grounds for the motion were that the subject matter of the complaint was beyond the jurisdiction of the Commission, and was exclusively within the jurisdiction of the Government of the United States by reason of Paragraph 3, Section 8 of Article I of the Constitution of the United States, and of the United States Warehouse Act, and the Commodity Exchange Act,[2] and of the official regulations duly promulgated thereunder. (R. 25)

On October 10, 1944, the Commission entered its order denying all motions of respondents to dismiss the Rice complaint and setting the cause for hearing before it on October 24, 1944. (R. 27) The respondents in this case and in No. 471, thereupon filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, separate complaints for the purpose of enjoining Rice from the further prosecution of its proceeding before the Commission; of enjoining the Commission from enter-

[2] Tit. 7 U. S. C., Sec. 1, et seq.

taining further jurisdiction in the matter; and the Attorney General of the State of Illinois from instituting any proceeding against respondents for the purpose of enforcing any order of the Commission in the Rice proceeding. (R. 3-15)

The defendants named in the respondents' complaint filed answers and motions to strike the complaint and dismiss the cause. (R. 36, 40, 43) The two causes were consolidated for hearing in the trial Court and, on June 26, 1945, that court entered a single order, dismissing both causes of action. (R. 91) Upon separate appeals to the Seventh Circuit Court of Appeals, the order of the trial court was reversed. (R. 126) The Commission and the Attorney General of the State of Illinois, and Rice, have filed here their petitions for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT.

(1) This case is important, not alone to the parties named in the caption, but to warehousemen, grain dealers, farmers, states, and the public generally, all of whom are necessarily affected by the precedent which the judgment below creates. The history and development of all present day public utility regulation stems from the early undertaking of the States to regulate warehouses and warehousemen. Since the landmark case of *Munn* v. *Illinois*, 94 U. S. 113, decided in 1876, warehousing has traditionally been a field for state regulation. The effect of the decision of the Court below, if permitted to stand, is to strip from the states this historic and important regulatory function as to every warehouseman who has obtained a license from the Secretary of Agriculture. Such a far reaching decision, so destructive of long exercised state jurisdiction, ought not to become operative without the sanction of this Court.

(2) The Court below held that State regulation of federally licensed warehousemen had been superseded in every

respect. Yet the federal act does not authorize the Secretary of Agriculture, among other things, to (a) fix or establish just and reasonable rates and charges; (b) prevent discriminatory rates and practices; (c) prevent the abandonment of warehousing service and capacity; or (d) approve or disapprove financial transactions or the issuance of securities. The effect of the decision of the Court below is therefore to create a hiatus in regulation, relieving warehousemen who secure federal licenses, from important phases of regulation which are essential to protect the public interest. Unless and until this Court finds that Congress intended to create such a vacuum in the regulation of warehouses, this undesirable result of the decision of the Court below ought not to become effective.

(3) The trial court held that "there is no direct conflict between a licensing system to protect against fraudulent warehouse receipts, and utility regulation to preserve the service in the public interest and it does not clearly appear that the state law has been completely superseded as to all of the matters covered by the complaint." (R. 90) The Circuit Court rejected this view, holding that state regulation had been wholly superseded. It is open to grave doubt whether the view of the law expressed by the Circuit Court will be adopted by this Court—a doubt which will almost surely produce further litigation in other states unless put to rest in this case by this Court.

(4) These questions are questions of substance and general importance relating to the construction of the Constitution and federal statutes. They have not been, but should be, settled by this Court. The misconstruction which the Court below has placed upon the pertinent federal statutes should be corrected now by a decision of this Court, so that the Illinois Commerce Commission and other state commissions vested with authority under state statutes, to regulate warehousing, may proceed with their official duties within such jurisdictional bounds as this Court may pre-

scribe; so that further unnecessary litigation may be avoided; so that warehousemen may know what will be the legal consequences of their acts; and so that the states may be left undisturbed in the exercise of their proper powers, which Congress designed to preserve.

THE QUESTION PRESENTED.

The petition for certiorari and brief in support thereof, filed by the Attorney General of Illinois and the Illinois Commission, present a number of procedural questions of great importance. This *amicus curiae* concurs fully in the views of the petitioner on these procedural questions and believes that they are determinative in this case and call for a reversal of the judgment. However, the far-reaching precedent created by the decision of the Court below, which gives paramount concern to this *amicus curiae*, relates to the decision of that Court on the merits of the controversy. Accordingly, this brief will deal solely with the question on the merits, which may be stated as follows:

> Has the federal government, by legislation, so occupied and preempted the field of regulation of grain warehousemen as to deprive the Commission of authority to grant the relief and therefore regulate in the manner prayed for by Rice?

SUMMARY OF ARGUMENT.

I. (Pages 11 to 13). Beginning with *Munn* v. *Illinois*, 94 U. S. 113, the regulation of public warehousemen has become a traditional function of State government. Because of this, the principles of supersedure should be strictly applied here in favor of continued validity of State authority. The problem is to ascertain the intention of Congress. But in supersedure cases it is uniformly held that the purpose of Congress to supersede is not lightly to be inferred, but the intention to do so must definitely and clearly appear. *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, 315 U. S. 740, 749. The presumption favors continued

validity of State authority. *Reid* v. *Colorado,* 187 U. S. 137, 153. Supersedure can occur only where there is an irreconcilable conflict between the particular provisions of the federal and state statutes, or where the state statute plainly and palpably infringes the policy of a federal act. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 766.

II. (Pages 13 to 45). The Rice complaint, which led the Commission to institute this proceeding, sought relief under nine separate and distinct provisions of the Illinois statutes. The injunction prevents the Commission from considering any one of these nine items. If, therefore, it can be established that the Commission's jurisdiction has not been superseded with respect to any one or more items, then granting the injunction was clearly erroneous. It is true that, unless the entire state statute is sustained, there is the possibility that the validated portions may not be considered severable from those which are held to be superseded. But this Court will not determine, in the first instance, whether a comprehensive state statute is severable. *Watson* v. *Buck,* 313 U. S. 387. Nor will the Court look, for supersedure, among state statutes which have not been applied. *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd., supra.* As yet, the Commission has been given no opportunity to apply any provision of the state statutes to these respondents.

The rate regulatory provisions of the Illinois statute, invoked by Rice, do not conflict with the Secretary's limited functions respecting rates. The Rice complaint asks the Commission to prescribe just, reasonable and non-discriminatory rates. The Secretary cannot prescribe rates, but has only power to revoke licenses because of unreasonable rates, and to require that warehouse rates be filed and posted. The mere acceptance of a schedule of rates for filing does not imply that they have been approved. *Interstate Commerce Commission* v. *Cincinnati etc. R. Co.,* 167 U. S. 479, 504. It cannot be assumed that a state agency will violate its statutory duty by prescribing unreasonable

or extortionate rates. If the Secretary finds state-prescribed rates to be unreasonable, the warehouseman may nevertheless continue to charge such rates by giving up his permissive federal license. But if it is the intent of the Warehouse Act that a licensee may not be compelled, by state action, to follow a course which compels revocation of the federal license, still no conflict with the state's general rate regulation is involved. Under the *Shreveport* doctrine, no requirement under the Warehouse Act can conflict with normal state regulation. Nor, under the principles of supersedure, is the Court required to anticipate every possibility of invalid action by the state. *W. W. Cargill Co.* v. *Minn. ex rel. Railroad and W. Com.*, 180 U. S. 452, 468.

The *Hefley case* (158 U. S. 98), relied upon by respondents, is not in point, for it involved interstate railroad rates, and the federal and state statutes there in question prescribed conflicting rules covering precisely the same matter.

The provisions of the Illinois statutes relating to discriminatory and preferential practices, do not conflict with the federal act. The federal statutes bearing on these matters do not cover all the types of discrimination charged in the Rice complaint. In no respect does the federal act give the Secretary power to order discontinuance of discrimination, or to direct revisions in the complained-of practices. None of the provisions of the federal act apply to grain stored by respondents for intrastate commerce. *United States* v. *Hastings*, 296 U. S. 188.

The provision of the Illinois Constitution prohibiting warehousemen from dealing in grain does not conflict with the federal act. Section 18 of the federal act, requiring warehouse receipts to disclose whether the warehouseman has stored his own grain, does not authorize or approve the practice or preclude a state from prohibiting the practice. The proviso to Section 18 indicates that Congress acknowledged the continued operation of state laws per-

taining to grain stored in federally licensed warehouses. A similar provision in another federal statute has been held not to preclude state laws on the subject. *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188. Enforcement of the state prohibition against such practice would not invalidate outstanding warehouse receipts, for the state orders and penalties would run against the warehouseman—there is no provision for confiscation of the grain.

The provisions of the Illinois statute respecting contracts between affiliates or with other public utilities, and respecting issuance of securities, do not conflict with the federal act. The federal act gives the Secretary no express authority as to these matters. The *Cloverleaf* case (315 U. S. 148) does not support the view that the Secretary has implied power to deal with these matters, since there the Court found the state act to be in conflict with the federal agency's expressly conferred powers.

State control of these contracts and security issues, would not conflict with any other function or power of the Secretary. Respondents' proposition that no state or local law must be permitted to affect construction projects required by the Secretary, would nullify zoning ordinances, fire and building codes, and Blue Sky laws, along with the state powers here in question. The only possibility of conflict envisaged by respondents involves a hypothetical case of the most imaginative character. The true question is not whether the state act *might* be so administered as to give rise to conflict, but whether it *is* being so administered here. *Terminal R. Assoc.* v. *Brotherhood of R. Trainmen*, 318 U. S. 1.

III. (Pages 45 to 66). The Illinois statutes regulating warehouses do not infringe the policy of the United States Warehouse Act. As a general rule, the failure of Congress to occupy the entire field is not to be taken as an intention to require that the unoccupied portion remain unregulated. *Kelly* v. *Washington*, 302 U. S. 1. As originally enacted in 1916, the federal act was not intended to

supersede all state regulation. The act was limited in scope to the establishment of a federal system of warehouse receipts, so that agricultural products could have value as collateral. This is indicated not only by an analysis of the statute, but also by examination of the legislative history.

The 1931 amendment did not change the scope of the act, but made federal action "exclusive" within the limited field covered by the original act. This is indicated by the language of the act. Amended section 29 still provides for cooperation with the states, and "Where the Government has provided for collaboration the courts should not find conflict." *Union Brokerage Company* v. *Jensen*, 322 U. S. 202. That the 1931 amendment of Section 29 did not operate to supersede all state regulation applicable to federally licensed warehousemen is also indicated by the legislative history, and by what this Court said in *United States* v. *Hastings*, 296 U. S. 188. Like conclusions, for like reasons, must be drawn regarding the 1931 amendment of section 6.

In considering this whole question of state infringement upon a policy of Congress, great weight must be given to the fact that we are here dealing with a long-exercised function of state government. *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144.

IV. (Pages 67 to 74). The Supreme Court cases holding that supersedure has occurred are clearly distinguishable. Most of these decisions involve matters which, unlike warehouse regulation, have been customarily controlled at the national level. Where preemption has been found in a field theretofore open to state regulation, this has been due to a conflict of precise regulations or a clash between the policy of the federal and state acts, both of which are lacking in the instant case. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, although clearly distinguishable from the present case, represents about the farthermost point the Court has indicated a willingness to go in

finding supersedure. This case turned on a five to four decision and the essence of the views expressed in the dissenting opinion (and much of the exact language) became the majority opinion a year later, in *Penn Dairies* v. *Milk Control Com.*, 318 U. S. 261.

ARGUMENT.

I.

In the Absence of a Conclusive Showing of Congressional Intent, Federal Legislation Should Not Be Held to Supersede the Historic Function of the States in Regulating Public Warehouses.

In response to the pressures of the Granger movement, the Illinois constitution of 1870, and the statutes of Illinois, enacted the following year, provided for State regulation of public warehouses. The movement grew and bore fruit in other States until today forty-one states provide some degree of warehouse regulation and thirty states regulate warehouse rates and charges.[3]

In the case of *Munn* v. *Illinois*, 94 U. S. 113, upholding the original Illinois constitutional and statutory provisions relating to warehouses, the concept of businesses "affected with a public interest" had its American origin. Building on this concept, the States and the federal government; developed the comprehensive system of public utility regulation which we know today.

Is it possible that Congress intended to strike down state authority so early, continuously, and generally exercised as to become a traditional function of state government—authority which is at the very root of all public utility regulation in the country today?

When the question is revealed in this setting, it becomes apparent that there is here involved no ordinary case for

[3] The statutes of the various states, providing such regulation, are listed in an appendix attached to the brief herein filed by Daniel F. Rice & Co.

application of the principles of federal supersedure. Applied to such a case as this, every intendment of those principles which favors continued validity of state authority takes on added weight and vitality.

As in all cases involving statutory construction, the problem here is to ascertain the intention of Congress. In recognition of the serious effect which any federal supersedure may have upon the proper functioning of state government in the local public interest, the Court has uniformly held that the purpose of Congress to supersede or exclude state action is not lightly to be inferred. The intention to do so must definitely and clearly appear.

> *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, 315 U. S. 740, 749;
> *Kelly* v. *Washington*, 302 U. S. 1, 12;
> *Illinois Cent. R. R. Co.* v. *Pub. Utilities Com. of Illinois*, 245 U. S. 493, 510;
> *Reid* v. *Colorado*, 187 U. S. 137, 148.

In all such cases the presumption is in favor of the continued validity of state authority. As the Court said, in *Reid* v. *Colorado, supra:*

> "The principle is universal that legislation, whether by Congress or by a state, must be taken to be valid, unless the contrary is made clearly to appear; . . ." (page 153)

Examination of the cases indicates that supersedure can occur only where there is an irreconcilable conflict between the particular provisions of the federal and state statutes, or where the state statute plainly and palpably infringes the policy of a federal act.

This analysis of the supersedure cases accords with what this Court recently said in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766:

> "Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state stat-

ute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, . . . or unless the state law in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."

That this has been the consistent view of the Court over a long period of time is indicated by the following expression of the Court in *Sinnot* v. *Davenport*, 22 How. (U. S.) 227, 243, decided in 1859:

> "We agree, that in the application of this principle of supremacy of an Act of Congress in a case where the state law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two Acts could not be reconciled or consistently stand together; . . ." (page 247)

On the question of supersedure, therefore, the issues of this case come down to these two: (1) Is there an irreconcilable conflict between the provisions of the Illinois statutes regulating warehouses and those of the United States Warehouse Act?; and (2) Do the Illinois statutes regulating warehouses plainly and palpably infringe the policy of the United States Warehouse Act? These two questions are dealt with separately in the succeeding sections of this brief.

II.

There is No Irreconcilable Conflict Between the Provisions of the Illinois Constitution and Statutes Regulating Warehouses and Those of the United States Warehouse Act.

The Commission proceeding should not have been enjoined if any one of the Illinois Constitutional or statutory provisions invoked by Rice is found to be non-conflicting with the federal act.

The Rice complaint, filed with the Commission on July 28, 1944, sought relief under nine separate and distinct provisions of the Illinois statutes governing the regulation of

public warehouses. These items are set out in paragraph 13 of that complaint (R. 21), and are herein briefly summarized in the Statement of the Case.

The injunction ordered by the Court below prevents the Commission from considering any one of these nine items. This blanket injunction against continuance of the entire Commission proceeding was ordered on the theory that the Commission's jurisdiction as to each and every phase of warehouse regulation had been superseded with respect to federally-licensed warehousemen.

If, therefore, it can be established that the Commission's jurisdiction has not been superseded with respect to one or more items of relief prayed for, then granting of the blanket injunction was clearly erroneous.

This is true even though it be assumed that, as to some of the items of relief prayed for, the Commission's jurisdiction has been superseded. In that event the Court below ought to have permitted the proceeding to progress, subject to a later court review of the resulting Commission order. This would have given the Commission an opportunity to consider and act upon those items which remained within its jurisdiction. At the very least, the Court below, in these circumstances, ought to have prescribed the boundaries of permissible Commission action, rather than prohibiting all action by the Commission.

It may be contended that, if any provision of the Illinois regulatory statutes is found to be invalid, because in conflict with the federal act, then the entire state regulatory act must fall. This raises the question of the divisibility of the Illinois statute. However, the question of the severability of state statutory provisions is one for the Commission and the state court and not for a federal court, to pass on in the first instance. In this connection it may be noted that the Illinois Public Utility Act contains the usual severability clauses.[4]

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[4] Smith-Hurd Ill. Ann. Statutes, Chap. 111-2/3, Sec. 93 (1921, June 29, Laws 1921, p. 702, art. VII, Sec. 89).

In *Watson* v. *Buck*, 313 U. S. 387, this Court reversed a lower court decision which held that eight sections of a 1937 Florida Act regulating the business of persons holding music copyrights were unconstitutional, and that therefore the entire act must fall, as the act was intended to form a "harmonious whole" and to "stand or fall together." In rejecting this view, the Supreme Court said:

> ". . . the very scope of these two statutes illustrates the wisdom of a policy of judicial self restraint on the part of federal courts in suspending state statutes in their entirety upon the ground that a complainant might eventually be prosecuted for violating some part of them. The Florida Supreme Court, which under our dual system of government has the last word on the construction and meaning of statutes of that state, has never yet passed upon the statutes now before us. It is highly desirable that it should have an opportunity to do so. There are forty-two separate sections in the two acts . . . No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. It is sufficient to say that the statutes before us are not of this type. Cases under the separate sections and paragraphs of the acts can be tried as they arise—preferably in the state

courts. Any federal questions that are properly presented can then be brought here . . ." (page 401)

In *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd., supra,* a similar view was expressed, the Court saying:

". . . Nor is the unconstitutionality of the provisions of the state Act which underlies the present order established by a showing that other parts of the statute are incompatible with and hostile to the policy expressed in the federal Act. Since Wisconsin has applied to appellants only parts of the state Act, the conflict with the policy or mandate of the federal Act must be found in those parts . . ." (page 750)

See, also, *W. W. Cargill Co.* v. *Minnesota ex rel. Railroad and W. Com.,* 180 U. S. 452, 466, 467, 468.

The Illinois Commission has been given no opportunity to apply any provision of the state statutes to these respondents. Until it does so, it cannot be determined whether the state statutes are applied in such a manner as to conflict with the federal act. Nor, until it does so, can a state ruling be obtained as to the severability of the state act. It follows from this that the injunction was improperly ordered unless it can be said now, by this Court that each and every provision of the Illinois statute invoked by Rice, if applied to any extent or degree to the respondents, would necessarily and irreconcilably conflict with the United States Warehouse Act, and has therefore been superseded.

Accordingly no attempt will be made in this brief to discuss every provision of the Illinois statute invoked by Rice. It will be sought, instead, to show that in at least several important particulars, such state statutes do not conflict with the federal act. If our argument proves convincing to the Court as to any one of those items then, as indicated above, the injunction was erroneously ordered.

The rate regulatory provisions of the Illinois statute, invoked by the Rice complaint, do not conflict with those of the United States Warehouse Act.

THE RATE FEATURES OF THE FEDERAL ACT ARE EXTREMELY LIMITED.

As indicated by the Court below (R. 119), the most important and controversial charge in the Rice complaint relates to respondents' warehouse rates. Paragraph 7 of the complaint alleges that each and all of the respondent warehousemen are unlawfully maintaining unjust, unreasonable and excessive rates and charges. (R. 19) Paragraph 13 (g) avers that respondents are charging unjust, unreasonable and discriminatory rates, in violation of sections 32, 38 and 41 of the Public Utility Act and section 15 of the Illinois Grain Warehouse Act. (R. 22) Paragraph 14 sets forth several respects in which the charging of unreasonable, excessive, and discriminatory rates, and other complained-of practices of the respondents, are injuring Rice and operating to the detriment of the general public interest. (R. 22) With respect to rates, the prayer of the Rice complaint asks the Commission to:

> "(d) Institute an inquiry and investigation of the unjust, unreasonable and discriminatory rates. . . .
>
> . . .
>
> "(f) After hearings, fix just, reasonable, non-discriminatory and non-preferential rates and charges for the public storage of grain." (R. 23)

Do the state rate regulatory statutes invoked by Rice, and the relief prayed for in the complaint, if granted, irreconcilably conflict with the rate provisions of the United States Warehouse Act? To determine this we must first turn to the federal statute.

There are only two sections of the United States Warehouse Act which specifically mention storage rates and charges. These are sections 25 and 18, the pertinent provisions of which read as follows:

Sec. 25. "The Secretary of Agriculture, or his designated representative, may, after opportunity for hearing has been afforded to the licensee concerned, suspend or revoke any license to any warehouseman conducting a warehouse under this chapter . . . upon the ground that unreasonable or exorbitant charges have been made for services rendered. . . ."

Sec. 18. "Every receipt issued for agricultural products stored in a warehouse licensed under this Chapter shall embody within its written or printed terms . . . (e) the rate of storage charges; . . ."

In addition to these statutory references to rates, the Secretary, pursuant to his rule-making authority, conferred by section 28 of the Act, has promulgated two regulations pertaining to warehouse rates and charges. These regulations, as summarized by the respondents in the Court below, are as follows:

Reg. 5, Sec. 3. "A warehouseman shall not make any unreasonable or exorbitant charge for services rendered. Before a license to conduct a warehouse is granted under the Act the warehouseman shall file with the department a copy of his rules and a schedule of charges to be made by him if licensed." Before making a change in rules or charges, a warehouseman must file a statement with the Department of Agriculture showing the proposed change and reasons therefor. Current rules and charges must be conspicuously posted in the principal office where receipts issued by the warehouseman are delivered to depositors.

Reg. 2, Sec. 7. Before revoking a warehouseman's license "upon the ground that unreasonable or exorbitant charges have been made for services rendered, the warehouseman involved shall be furnished by the Secretary, or his designated representative, a written statement specifying the charges and shall be allowed a reasonable time within which he may answer the same in writing and apply for a hearing, an opportunity for which shall be afforded in accordance with regulation 10, section 4."

The respondents also rely upon two additional sections of the act as vesting rate regulatory authority in the Secretary. These are sections 13 and 23, the pertinent provisions of which read as follows:

> Sec. 13. "Every warehouseman conducting a warehouse licensed under this chapter *shall receive* for storage therein, so far as its capacity permits, any agricultural product of the kind customarily stored therein by him which may be tendered to him in a suitable condition for warehousing, in the usual manner in the ordinary and usual course of business, without making any discrimination between persons desiring to avail themselves of warehouse facilities."[5]
>
> Sec. 23. "Every warehouseman . . . shall make reports to the Secretary of Agriculture concerning such warehouse and the condition, contents, operation, and business thereof in such form and at such times as he may require. . . ."

The respondent contends that section 13, quoted above, gives the Secretary authority to prevent discrimination in the matter of rates. The words "shall receive," shown in italics, plainly indicate, however, that the only discrimination there referred to is discrimination between persons in the matter of receiving grain for storage. If this section had been intended to include rate discrimination, then section 25, in providing for the revocation or suspension of licenses, would not have omitted all reference to "discriminatory" charges and referred only to "unreasonable or exorbitant" charges. Had Congress intended to give the Secretary authority to eliminate discriminatory rates and charges, it would have chosen plain and unambiguous language to say so, either in section 13 or in section 25.

Section 23, also quoted above, giving the Secretary power to require reports, does not appear to have any direct relation to rate regulation. Possibly the Secretary could facilitate rate regulatory functions, if he had any, by requiring the filing of reports containing data bearing on the

[5] Emphasis here, and elsewhere in this brief, is supplied.

matter. But the section does not itself confer any rate authority, nor is it shown that the Secretary has ever utilized the power there granted by requiring the filing of reports in aid of rate regulation.

Accordingly, it appears that the full extent of federal "rate regulation" under the United States Warehouse Act, and the regulations issued thereunder, is comprised of the following four items: (1) warehousemen must file a schedule of charges with the Secretary as a condition to securing a license; (2) warehousemen must file with the Secretary any change in charges and reasons therefor; (3) warehousemen must post their rules and charges in a conspicuous place; and (4) the Secretary may, after hearing, revoke or suspend a federal license for unreasonable or exorbitant charges.

The exceedingly meager and limited nature of the Secretary's power over rates, as analyzed above, becomes apparent when comparison is made with the usual and ordinary provisions relating to rates which are to be found in any comprehensive regulatory statute. For example, the Illinois Public Utility Act, which Rice has invoked in this case, contains the following rate regulatory provisions wholly absent from the federal statute and regulations thereunder:

(1) Power to prescribe rates. (Sec. 41)

(2) Forbidding rate discriminations. (Secs. 37, 38)

(3) Power to suspend rate changes pending investigation. (Sec. 36)

(4) Prohibiting rebates and refunds. (Secs. 37, 39)

(5) Reparations for overcharges. (Sec. 76).

No Actual or Threatened Rate Conflict is Involved Here.

The only rate relief prayed for in the Rice complaint is to "fix just, reasonable, non-discriminatory and non-preferential rates and charges . . ." (R. 23) The Illinois Commission has power to grant this relief. The Secretary has no such power. This the respondent admits. Where then is the "direct and positive" conflict, to use the language of *Sinnot* v. *Davenport*, 12 How. (U. S.) 227? Since the federal act contains no rate-prescribing power and the state act does, and since the rate-prescribing power is the only state rate power invoked in this case, how can it be said that "the two Acts could not be reconciled or consistently stand together," to again use the language of *Sinnot* v. *Davenport*?

Far from there being any direct, positive, or irreconcilable conflict between the federal and state acts, the truth is that, federal authority being wholly absent, there is no vestige of conflict as to the only state rate function sought to be applied here.

Nevertheless, the Court below believed that there might be direct conflict in the matter of rate regulation, saying:

> ". . . It must be remembered that one of the conditions upon which the Secretary is authorized to issue a license is the showing by the applicant therefor that the charge which the latter proposes to make is not unreasonable or exorbitant. This is a matter solely for the determination of the Secretary. Assuming that the state authority has the right to fix such rate, it would of course have the right to determine a rate higher than that determined by the Secretary to be not unreasonable or exorbitant. In such a situation the warehouseman would be subjected to the penalty provided for a failure to comply with the state rate, and at the same time in order to procure or retain a federal license he would be compelled to violate such rate. Certainly a warehouseman could neither fix nor raise his charge without the approval of two separate and distinct authorities. . . ." (R. 119)

The fundamental error in this statement is the assumption that warehouse rates on file with the Secretary have been approved as not being unreasonable or exorbitant.

The Secretary's regulations (Reg. 5, Sec. 3, quoted above) stipulate that a warehouseman shall not make any unreasonable or exorbitant charge; that, before a license is granted, the warehouseman shall file a copy of his rules and a schedule of charges to be made by him if licensed; and that, before making a change in charges, a warehouseman must file a statement showing the proposed change and reasons ther for. But neither the statute nor the regulations provide that such rates shall be approved as being reasonable. The filed rates are merely the licensee's conception of reasonable charges, and the only time they are subjected to a determination of reasonableness by the Secretary is if and when a license revocation or suspension proceeding is instituted.

Here, as in the case of all rate regulatory systems, the mere acceptance of a schedule of rates for filing does not imply that they have been approved. This rule is so well settled that no extensive citation of authority is required, but see:

Interstate Commerce Commission v. *Cincinnati etc. R. Co.*, 167 U. S. 479, 504;
Cleveland v. *Hope Natural Gas Co.*, 44 P. U. R. (N. S.) 1.

Suppose, then, that the state orders a change in existing warehouse rates on the ground that existing rates are unjust, unreasonable or discriminatory. Such an order would not conflict with any order of the Secretary, for, as pointed out above, there is no federal procedure for approval or disapproval of such rates. Upon issuance of such a state order the warehouseman would be required, under the federal regulations, to file the change with the Secretary, giving the reasons therefor. Again this could result in no conflict, for the Secretary has no function upon the filing of

such changes except to receive them, unless, of course he determines to institute a license revocation proceeding.

The Court below suggests that the state might fix a rate higher than that determined by the Secretary to be not unreasonable or exorbitant. As shown above, this could occur only where, after the state prescribed an exact rate, the Secretary thereafter determined, in a license revocation procedure, that such prescribed rate is unreasonable and exorbitant.

Naturally the first answer to this suggestion is that it pre-supposes the occurrence of a highly unlikely event. The tendency of state rate regulation would be to reduce warehouse rates, not increase them. The Rice complaint seeks a reduction in rates and the elimination of discriminatory rates. If the present warehouse rates on file with the Secretary have not moved the Secretary to institute a license revocation proceeding, certainly no newly prescribed level of rates to come out of this or any other state proceeding would be likely to call for such action. The respondents are contesting state jurisdiction here not because they fear the state will permit them to charge higher rates, but because they anticipate that a lower level of rates may be prescribed. Can anyone seriously believe that respondents are here fighting to save themselves from being required to increase their rates and so risk revocation of their federal licenses?

No prescription of rates by the state commission under the Illinois statute can conflict with any requirement of the Secretary under the United States Warehouse Act for the reason that the federal act gives the Secretary no power to prescribe rates. His sole power, as respects rates, is to revoke the license of a warehouseman if and when he finds that unreasonable and extortionate rates are being imposed by the licensee. Until such rates are imposed no such finding can be made by the Secretary.

It cannot be assumed that a state agency, the statutory duty of which is to require just and reasonable rates, will

violate its duty, and prescribe unreasonable or extortionate rates. Accordingly, it cannot properly be assumed that conflict can ever exist between requirements under the state statute and requirements under the federal act.

If, however, be it assumed the state commission will do what the state statute forbids it to do, and will prescribe rates for a warehouseman which are unreasonable and exorbitant, and that the Secretary will so find, there will still be no conflict, for the Secretary is given no power under the Warehouse Act to require rates to be changed. A warehouseman, whose rates have been found exorbitant by the Secretary, in a license revocation proceeding, may continue to impose rates thus disapproved by the Secretary, even in the entire absence of any state law requiring their imposition. If he chooses to do that, he may suffer a revocation of his federal license, and thus lose the status of a federal licensee, and such benefits as result to him from that status, but he may continue to charge the rates. How, then, can it be claimed that any conflict can result from any act of rate regulation by the state commission?

UNDER THE SHREVEPORT DOCTRINE, NO REQUIREMENT UNDER THE WAREHOUSE ACT CAN CONFLICT WITH NORMAL STATE REGULATION.

However, if it be said that the intent of the Warehouse Act is to enable the Secretary to cause a licensee to change his rates, found by the Secretary to be exorbitant, to avoid revocation of his license, there is still no conflict between that power, and any proper exercise of any power of the state commission under the Illinois statute. And there can be no conflict, even if the state commission improperly exercises its power, and prescribes a rate or rates found exorbitant by the Secretary, *except as to such rates as are thus found exorbitant.* As to those rates, the Secretary's finding may operate to supersede the state requirement to the extent necessary to enable the warehouseman to conform his rates to the finding.

The situation in such case would be analogous to that dealt with in the *Shreveport* case, 23 I. C. C. Rep. 31, *Houston E. & W. Texas Ry. Co.* v. *The United States*, 234 U. S. 342, decided by this Court in 1914. In that case the Texas Commission had prescribed intrastate railroad rates which the Interstate Commerce Commission found to be on a lower basis than rates found reasonable for application to interstate traffic, and unduly preferential of Texas cities and discriminatory against Shreveport, in violation of the provisions of the Act to Regulate Commerce (now the Interstate Commerce Act). Under the Act, as it then stood, the Commission had no power to prescribe intrastate rates for any purpose whatever. However, the Act did forbid carriers to give any undue advantage or preference to any person or locality, and did empower the Commission to require carriers to cease and desist from any violation of the Act. Upon its finding that the intrastate rates, in effect under the order of the Texas Commission, operated to give an undue and unlawful preference to Texas localities, the Commission ordered the carriers to "establish and maintain rates no higher" than those found reasonable for interstate application; and that order was sustained. The Court said:

> ". . . The commerce court sustained the authority of the Commission, and it is clear that we should not reverse the decree unless the law has been misapplied. This we cannot say; on the contrary, we are convinced that the authority of the Commission was adequate.
>
> "The further objection is made that the prohibition of section 3 is directed against unjust discrimination or undue preference only when it arises from the voluntary act of the carrier, and does not relate to acts which are the result of conditions wholly beyond its control. . . . The reference is not to any inherent lack of control arising out of traffic conditions, but to the requirements of the local authorities, which are assumed to be binding upon the carriers. The contention is thus merely a repetition in another form of the argument that the Commission exceeded its power; for it would not be contended that local rules could nullify the law-

ful exercise of federal authority. *In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement.* We are not unmindful of the gravity of the question that is presented when state and Federal views conflict. But it was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control.

"In conclusion: Reading the order in the light of the report of the Commission, it does not appear that the Commission attempted to require the carriers to reduce their interstate rates out of Shreveport below what was found to be a reasonable charge for that service. *So far* as these interstate rates *conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination.* But this result they are required to accomplish. . . ." (pages 359-360)

While the Act to Regulate Commerce, under which the *Shreveport* case was decided, contained a positive injunction held to be applicable to intrastate rates, and while the Act contained a provision under which the Interstate Commerce Commission was empowered to make orders applicable to such rates, yet those provisions operated only towards the correction of abuses, and did not in any way conflict with, or restrain, normal and proper rate regulation by the States. This was shown conclusively by the judgment of this Court in the *Minnesota Rate Cases*, 230 U. S. 353, decision in which was handed down in 1913, the year preceding the *Shreveport* case.

In the *Minnesota Rate Cases*, it was urged that the Act to Regulate Commerce should be construed to prevent a state from requiring intrastate rates to be maintained on a lower level than comparable interstate rates, established

under the Act. This Court rejected that contention, saying in part:

> "The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. . . . But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary, under existing conditions of transportation to conserve and promote the interests of interstate commerce. *If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine*, within the limits of its constitutional authority over interstate commerce and its instruments *the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon.* Nor, in the absence of Federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power." (pages 432-433)

Thereafter, in Section 13 (3) and (4) of the Act, as amended in 1920, the Interstate Commerce Commission was enabled to forbid the continuance of intrastate rates found by it to cause "any undue, unreasonable or unjust discrimination *against interstate or foreign commerce*," such discrimination was expressly forbidden, and the Commission was given power to prescribe intrastate rates to remove any discrimination found. Nevertheless, until the Commission finds that intrastate rates established under state law cause unlawful discrimination such rates are unaffected by the statute. *Board of Railroad Com.* v. *The Great Northern Ry. Co.*, 218 U. S. 412, 430. And when a finding of unlawful discrimination has been made intra-

state rates are superseded and displaced only to the extent specified in the order of the Interstate Commerce Commission declaring the discrimination. *Increases in Utah Freight Rates and Charges*, 255 I. C. C. 97.

It would seem undeniable that Congress, in the Interstate Commerce Act, has gone much farther in occupying the field of intrastate railroad rate making than in the United States Warehouse Act, it has gone as respects the rates of warehouses licensed under that Act; and yet the cases cited demonstrate that no conflict has resulted between such federal regulation of intrastate railroad rates as is exercised through the Interstate Commerce Commission and normal and proper regulation of such rates by state authorities. How, then, can it be contended that there is any such conflict between normal regulation of warehouse rates under the Illinois statute here considered and any requirement of or under the United States Warehouse Act?

UNDER PRINCIPLES OF SUPERSEDURE, THE REMOTE POSSIBILITY OF FUTURE CONFLICT IN A PARTICULAR CASE WILL NOT JUSTIFY BLANKET NULLIFICATION OF GENERAL STATE RATE REGULATION.

The Court, in this proceeding, is not required to anticipate every possibility of invalid action by the state, and certainly should not do so where the relief prayed for is a general injunction against all state regulation in a particular field. The respondents will have an adequate remedy if and when the state issues an order which is, in fact, invalid. As the Court said, in *W. W. Cargill Co.* v. *Minn. ex rel. Railroad and W. Com., supra*, in rejecting the contention that state warehouse regulation should be enjoined because it might be administered in an unconstitutional manner:

> ". . . If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the

> United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings." (page 468)

The same view was well stated in *Watson* v. *Buck*, quoted at some length at an earlier point in this brief.

The respondents rely chiefly upon *Gulf, Colorado and Santa Fe Railway Company* v. *Hefley*, 158 U. S. 98, as demonstrating that rate authority of the character conferred upon the Secretary by the United States Warehouse Act supersedes all state rate regulation of federally licensed warehousemen. There the Interstate Commerce Act specifically required carriers to charge the rates filed with the Interstate Commerce Commission. A Texas statute, on the other hand, required carriers to charge the rate named in the bill of lading. A particular bill of lading named a rate lower than indicated by the filed tariff, and the carrier insisted on collecting the tariff rate. A judgment against the carrier for the sum collected in excess of the rates shown in the bill of lading, was reversed by this Court. The Court said, in part:

> "Clearly the state and the national acts relate to the same subject-matter and prescribe different rules. By the state act the bill of lading is made controlling as to the rate collectible, and a failure to comply with that requirement exposes the delinquent carrier to its penalties, while the national statute ignores the bill of lading and makes the published tariff rate binding, and subjects the offender, both carrier and agent, to severe penalties. The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. * * *. The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law." (page 102)

The *Hefley* case involved railroad rates applicable to traffic moving interstate. Ever since *Wabash etc. Ry.* v.

Illinois, 118 U. S. 557, interstate railroad rates have been held beyond the reach of state regulation, not because of supersedure by a federal statute, but upon the Constitutional ground that, as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. *Minnesota Rate Cases, Simpson* v. *Shepherd*, 230 U. S. 352, 399. But no such Constitutional principle has ever been applied in the case of state regulation of warehouse rates, and this court has uniformly recognized the propriety of state action in that field. *Munn* v. *Illinois*, *supra*; *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144.

A further point of difference between the *Hefley* case and the instant one lies in the fact that the Interstate Commerce Act, while not as comprehensive at the time of the *Hefley* case as it is today, was, even then, primarily a rate regulatory statute, having as its principal purpose the prevention of rate discrimination and secret rebates. Here the rate features of the United States Warehouse Act are purely incidental to the primary objective of establishing a sound system of warehouse receipts, the meager rate powers being only for the purpose of limiting the privileges of the federal warehouse receipt system to those who are equitably entitled thereto.

But, still more important, is the fact that the federal and state statutes involved in the *Hefley* case prescribed conflicting rules covering precisely the same matter. The federal act stipulated that the tariff rate is controlling. The state act specified that the bill of lading rate should control. The case itself presented a situation where a direct and irreconcilable conflict had arisen. Under elementary principles of supersedure, the dilemma had to be resolved in favor of the federal act.

No comparable situation exists in the instant case. No one has contended here that the state statute does or could authorize a federally-licensed warehouseman to disregard the rates on file with the Secretary, or to desist from filing rate schedules with the Secretary. If the state orders a

change in rates, the federally-licensed warehouseman will have to file the new rates with the Secretary, but obviously this involves no conflict. The federal act contemplates that rate changes will be made and indicates how this is to be accomplished.

But, as pointed out above, even if there is the possibility that state rate regulation might, under some future set of circumstances, be found in conflict with the federal act, this does not call for blanket nullification of state regulation at this time. Few state regulatory statutes could withstand the challenge of supersedure if they were required to run the gauntlet of every hypothetical source of conflict that can be imagined. The principles of supersedure heretofore mentioned call for an attempt to find reconciliation, not a search for possible conflict.

The true question is not whether the state act might be so administered as to give rise to conflict, but whether it *is* being so administered here. As this Court said, in *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd., supra,* holding that supersedure had not occurred:

> ". . . Section 10 (of the National Labor Relations Act) grants the federal Board 'exclusive' power of enforcement. It is not sufficient, however, to show that the state Act *might* be so construed and applied as to dilute, impair, or defeat those rights. Watson v. Buck, 313 U. S. 387. . . ." (page 750)

Respondents' effort here to conjure up a situation where conflict between federal and state rate regulation might develop is similar to the arguments which were advanced in *Terminal R. Assoc.* v. *Brotherhood of R. Trainmen,* 318 U. S. 1, and it should draw the same response from this Court. In that case, the Illinois Commission, as an outgrowth of a dispute between the carrier and its employees, ordered the railroad to attach cabooses to its interstate trains. In holding that the state statute, under which the Commission had proceeded, had not been superseded by the Railway Labor Act, the Court said:

"State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters *might*, we suppose, be the subject of a demand by workmen for better protection and upon refusal *might* be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies *might* be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. . . . it cannot be that the minimum requirements laid down by state authority are all set aside. . . ." (page 7)

The provisions of the Illinois statutes relating to discriminatory and preferential practices, do not conflict with the provisions of the United States Warehouse Act.

Aside from the matter of rate discrimination, which has already been discussed in this brief, the Rice complaint charges that respondents have been guilty of the following discriminatory practices:

"(a) Mixing high quality public grain with inferior grain owned or acquired by the defendant warehouseman to reduce grain delivered to the point of minimum quality within the established grain trade.

"(b) Sacrificing part of storage charges to offset purchases and sales of grain and otherwise manipulating and rebating storage charges on grain stored in private warehouse space.

"(c) Furnishing transit tonnage to owners of public grain of the most undersirable type, while withholding for their own use the most desirable transit tonnage, thereby placing the owners of public grain at a distinct disadvantage in merchandising grain in storage.

"(d) Providing for storage of public grain in old wooden warehouses carrying exorbitant insurance

premium rates, while storing the warehousemen's own grain in modern warehouses with reasonable insurance premium rates.

"(e) Unduly and imprudently delaying loading of grain after return of warehouse receipt issued by the particular warehouseman, the tender of proper charges and the receipt of instructions to load grain for delivery." (R. 20)

Paragraph 16 (g) of the Rice complaint prays for the following relief as to discriminatory practices:

"(g) After hearings, issue an order prohibiting the discriminatory practices enumerated above, and establishing just, reasonable, safe, proper, adequate and efficient grain storage and warehousing service." (R. 24)

It is agreed by all that these alleged discriminatory practices are prohibited under the state statute and that the State Commission has authority to order the discontinuance of any such discrimination. The only reference to discrimination, in the United States Warehouse Act, is that contained in section 13, reading as follows:

"Every warehouseman conducting a warehouse licensed under this chapter shall receive for storage therein, so far as its capacity permits, any agricultural product of the kind customarily stored therein by him which may be tendered to him in a suitable condition for warehousing, in the usual manner in the ordinary and usual course of business, without making any discrimination between persons desiring to avail themselves of warehouse facilities."

As heretofore indicated, the foregoing section prohibits discrimination, as between persons, in the *receiving* of grain for storage, but has nothing to say regarding any discriminatory practices after the grain is received and stored. Nor does the federal act anywhere give the Secretary authority to order elimination of discriminatory prac-

tices except that, with respect to discrimination in the receiving of grain, the Secretary may revoke the license.

The federal act and the Secretary's regulations contain some additional provisions which bear upon subparagraph (a) of the Rice complaint, quoted above, relating to the mixing of high quality grain with inferior grain. These additional provisions, as summarized by the respondents in their brief to the Court below, are as follows:

UNITED STATES WAREHOUSE ACT.

Sec. 15. Fungible agricultural products in a federally licensed warehouse shall be inspected and graded by an inspector licensed to grade under the Federal Act.

Sec. 16. Warehouseman may mingle fungible agricultural products with other products of the same kind and grade but warehouseman shall not mix fungible agricultural products of different grades.

Sec. 30. Fine and imprisonment is provided for any person who fraudulently grades any agricultural products stored under the provisions of the Act.

Regulations.

Reg. 5, Sec. 18. Warehouseman may not mix lots of different grades of grain except when identity of grain stored is to be preserved.

Reg. 5, Sec. 12. Warehouseman shall accept grain for storage and deliver grain out of storage in accordance with the grades of such grain determined by duly licensed inspector. Appeal may be taken from inspector's grading.

Reg. 5, Sec. 16. Warehouseman shall deliver fungible grain to lawful holder of warehouse receipt of the grade and quantity named in such receipt.

These additional provisions of the federal act and regulations, taken together, may be considered as covering all the matters of discrimination in subparagraph (a) of the

Rice complaint, quoted above. The only enforcement provision, however, aside from the penal provision of section 30, where grain has been fraudulently graded, is the power vested in the Secretary to revoke the federal license. The Secretary has no authority to order the discrimination eliminated and to prescribe the manner in which this shall be accomplished.

Moreover, neither the penal provisions of section 30, nor the license revocation procedure of section 25, are in any way applicable to grain stored in the course of local business and not stored for interstate or foreign commerce. *United States* v. *Hastings, supra.* While the grain stored by respondents is predominantly stored for interstate or foreign commerce, up to 15 per cent of the grain stored by some respondents is neither received from nor shipped to States other than Illinois. (R. 67, 74)

In any event, the federal statutory and regulatory provisions quoted above have no application to the four other subparagraphs of the Rice complaint charging discriminatory practices. As to subparagraphs (b), (c) and (d), pertaining to rebates, transit tonnage and storage in old warehouses, the federal statute and regulations are completely devoid of any provision which would give the Secretary power to consider the Rice Complaint, and to act thereon.

As to subparagraph (e), relating to delay in loading grain, section 21 of the federal act provides that warehousemen shall "without unnecessary delay" deliver stored products upon proper demand. But here again, the Secretary has no authority to enforce this provision except by instituting a license revocation procedure, and the section has no application to grain stored for intrastate commerce.

As pointed out in the next section of this brief, the purpose of Congress in enacting the United States Warehouse Act was to provide a system of warehouse receipts which would establish the integrity of agricultural products as

collateral. It is therefore understandable why the federal act is so lacking in provisions for effective elimination of discriminatory practices and, accordingly, apparent that Congress did not intend to strip the states of this regulatory power.

State consideration and action upon these items of discrimination charged in the Rice complaint could not possibly interfere with the Secretary's function in assuring the integrity of federal warehouse receipts. Accordingly it is fair to conclude that there is no irreconcilable conflict as to these matters which calls for supersedure of the state statutes pertaining to discriminatory and preferential practices.

The provision of the Illinois Constitution prohibiting public grain warehousemen from dealing in grain does not conflict with the provisions of the United States Warehouse Act.

Article XIII of the Illinois Constitution of 1870, as interpreted and sustained in *Hannah* v. *People*, 138 Ill. 77, declares unlawful and contrary to the public policy of the state, the practice of warehousemen in occupying a dual and conflicting position as public grain warehousemen and at the same time dealing in grain, and of storing or mixing in their own public warehouse grain in which they have an interest, direct or indirect.

Paragraph 10 of the Rice complaint (R. 20) invokes this Constitutional provision. Affidavits filed by respondents disclose that several million bushels of grain owned by them and covered by federal warehouse receipts were stored in respondents' own warehouses.

The Court below held that this state Constitutional provision had been superseded by the federal act, saying:

> ". . . Section 18 of the Act, (Par. 260 U. S. C. A.) provides for the contents of receipts, and Par. (i) states. 'If the receipt be issued for agricultural products of which the warehouseman is owner, either solely

> or jointly or in common with others, the fact of such ownership shall be shown. It is argued that this provision does not authorize a federally licensed warehouseman to store his own grain. We think it does. The fact that the Secretary has permitted such storage *indicates that* he has so *construed the Act. To* sustain defendants' contention on this point would immediately invalidate receipts of the value of millions of dollars. It would seriously impair one of the main purposes of the Act, that is, the integrity of warehouse receipts." (R. 120)

Section 18 of the federal act, referred to in the above-quoted excerpt from the opinion of the Court below, and Regulation 4, Section 1(c), which is to the same effect, contain no prohibition against a warehouseman storing his own grain, neither do they expressly authorize and approve such practice. Their only purpose is to force the warehouseman to disclose the practice.

Why does the federal act require disclosure of this practice? Is it not because the practice is suspect and dealers in warehouse receipts are entitled to know what is going on? And if the practice has been recognized by Congress as of doubtful character, how can it be said that state prohibition of the practice conflicts with the federal policy?

That Congress acknowledged the continued operation of state laws pertaining to grain stored in federally licensed warehouses is indicated by one of the provisos to this same section 18. This proviso reads:

> "*Provided*, That unless otherwise required by the law of the State in which the warehouse is located, when requested by the depositor of other than fungible agricultural products, a receipt omitting compliance with subdivision (g) of this section may be issued: . . ."

All that Section 18 does, in effect, is to declare that storage of a warehouseman's own grain in his own ware-

house, is unlawful unless certain conditions are complied with, to wit, disclosure of the practice in the warehouse receipt. But this is not to say that, if this condition is complied with, the practice will be lawful, notwithstanding express prohibitions contained in state statutes.

The situation is similar to that involved in *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188. There the federal Grain Futures Act required persons contracting for grain futures to comply with certain conditions; including the condition that the contract be made by or through a member of a board of trade which has been designated by the Secretary of Agriculture. A Missouri statute, however, unconditionally forbade all contracts of this nature. In holding that the Missouri statute had not been superseded, this Court said:

> "The Federal Act declares that contracts for the future delivery of grain shall be unlawful unless the prescribed conditions are complied with. It does not provide that if these conditions have been complied with the contracts, or the transactions out of which they arose, shall be valid. It does not purport to validate any dealings. Nor is there any basis for the contention that Congress occupied the field in respect to contracts for future delivery; and that necessarily all State legislation in any way dealing with that subject is superseded. . . ." (page 198)

If the statutes or Constitution of a particular state, as in Illinois, prohibit a grain warehouseman from storing his own grain in his own warehouse, the warehouseman, complying with such provision, would simply desist from such practice and there would accordingly be no occasion for inserting any item on this matter in the federal warehouse receipt. There is no conflict here. And if the laws of another state do not prohibit such practice, and the warehouseman does store his own grain in his own warehouse, the federal receipt will so indicate. Again there is no conflict.

Nor is the integrity of the federal receipt affected in any manner because of lack of uniformity among the states. Warehousemen operating in the individual states will presumably know the law of those states, and no one of them operates in so many states that ascertainment of the state law would be burdensome.

So far as dealers in receipts, and holders of receipts, are concerned, all they need to look at is the receipt itself. If the receipt fails to disclose that the warehouseman is storing his own grain, the receipt holder is not concerned whether this is because of the warehouseman's voluntary choice or because a state law forbids the practice. And if the receipt recites that the warehouseman is storing his own grain, the receipt holder need not check to determine whether the warehouseman may or may not do this under the state law. Even if the state law prohibits such practice, this does not invalidate outstanding receipts. The Illinois State Constitution does not provide for confiscation of wheat unlawfully stored. The state's recourse is to order the warehouseman to cease the practice in the future and, perhaps, penalize him personally for past violations. In neither case is the receipt-holder affected.

Failure of the Court below to perceive this point apparently accounts for the ruling on this matter. The Court gave great weight to its conclusion that "To sustain defendants' contention on this point would immediately invalidate receipts of the value of millions of dollars." (R. 120) As shown above, not a dollars worth of receipt-value would be affected, since the state's enforcement of the Constitutional provision would run solely against the warehouseman.

Viewed in this light, we submit that the state constitutional provision in question does not irreconcilably conflict with the federal act.

The provisions of the Illinois statute respecting contracts between affiliates or with other public utilities, and respecting issuance of securities, do not conflict with any provision of the United States Warehouse Act.

Paragraph 13 of the Rice complaint (R. 21) alleges, among other things, that all or some of the respondent warehousemen have violated the laws of the State of Illinois by:

> "(a) Failing to secure prior approval of the Illinois Commerce Commission before entering into management, construction, engineering, supply, financial and similar contracts and arrangements between such warehousemen as public utilities and an affiliate, as required by Section 8 (a) of the Public Utility Act.
>
> "(b) Failure to secure prior approval of contracts, leases, etc., between such warehousemen and other public utilities, as required by Section 27 of the Public Utility Act.
>
> "(c) Failing to secure authorization of the commission before issuing securities payable at periods of more than twelve months after date, as required by Section 21 of the Public Utility Act."

The respondent concedes and the Court below acknowledges that the United States Warehouse Act contains no provisions expressly relating to the matters referred to in these paragraphs of the Rice complaint. But, for the purpose of demonstrating that state action as to these matters has been superseded with respect to federally-licensed warehousemen, it is said: (1) that the Secretary has implied power to deal with these matters; and (2) that state action as to these matters would conflict with the regulations and orders of the Secretary relating to other matters expressly covered by the federal act.

The suggestion that the Secretary had implied power to approve or disapprove contracts between affiliates or between warehousemen, and implied power to regulate the

issuance of securities, was not advanced by respondents in the Court below, but is to be found only in the opinion of the Circuit Court. The Court there covered the matter in these words:

> "... While we find nothing in the Act which expressly relates to such matters, we think, for the reasons already stated, that the Secretary has implied authority to deal therewith." (R. 122)

At an earlier point in the opinion, the Court below relied upon *Cloverleaf Butter Co.* v. *Patterson, supra,* to support the finding that the Secretary has implied power to deal with all the matters charged in the Rice complaint. (R. 118)

The *Cloverleaf* case, 315 U. S. 148, is discussed at some length in the last section of this brief. It is sufficient here to point out that neither the excerpt quoted by the Court nor any other language of that decision bears upon the question of the implied authority conferred by a federal statute. The question there was the state's right to inspect, seize and detain packing stock butter, from which renovated butter is made. The Court, in voiding state regulation of packing stock butter, did not say that the federal agency had "implied" authority to regulate such butter, it expressly held that "the Secretary of Agriculture of the United States cannot condemn the packing stock butter." (page 166). What the Court did hold was that such regulation by the state interfered with the federal agency's express authority to regulate renovated butter. The Court ruled that "confiscation by the state of material in production nullifies federal discretion over ingredients." (page 168)

Not only did the Court in the *Cloverleaf* case fail to make any pronouncement on the question of implied powers under a federal statute—it clearly indicated that the federal statutes are to be strictly construed when the question is one of supersedure. Said the Court:

> "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation." (page 156)

See, also, *Penn Dairies* v. *Milk Control Com.*, 318 U. S. 261, quoted in the final section of this brief.

But it is said that state action as to these contracts and security issues would conflict with the regulations and orders of the Secretary relating to other matters expressly covered by the Federal act. To support this view the respondents, in the Court below, put forth, as an example, what might happen if the Secretary, following an inspection of the warehouse, ordered installation of new equipment and facilities costing $150,000. To finance this, respondent assumes that the warehouseman enters into a contract with an affiliate and another utility under which he borrows $100,000, and issues $50,000 worth of debenture bonds for the balance.

Having portrayed this wholly imaginative episode, the respondents, in their brief below, then inquire:

> "Are these transactions subject to State approval when refusal would cause the revocation of his federal license? Is the Secretary of 'Agriculture's power limited by state approval? State approval of a federal licensee's contracts with affiliates, other utilities or securities would in such a case clearly hamper the administration of the Federal Act." (Resp. brief, page 56)

The plain implication of this argument is that all state or local laws and regulations which may be involved in connection with new warehouse construction or facilities ordered by the Secretary are to be completely ignored. A local zoning ordinance preventing the construction of an addition to a warehouse would be set for naught; state or local fire and building codes could be disregarded; state Blue Sky laws requiring the registration of security issues

could be by-passed—along with state laws requiring approval of contracts between utilities or utility affiliates and requiring approval of securities.

Under the respondent's reasoning, a federally-licensed warehouseman could, in aid of a remodeling or construction project ordered by the Secretary, enter into a contract with other types of utilities not subject to any control under the federal act (such as warehouses operating under state license), and, no matter how detrimental that contract might be to the public interest served by that other utility, the state would have no power to disapprove, or require revisions, of such contract.

Merely to state the consequences of the respondents' theory, carried to its logical conclusion, is to show its inadmissibility. If Congress, while failing to make any provision in the federal act for regulation of such contracts and security issues, had intended to strip the states of all authority over such matters, we would expect to find some expression of this intent in the language of the Act. As will be more fully discussed in the next section of this brief, the use of the word "exclusive" in the amended form of section 29, did not purport to exclude the states from the exercise of any power not actually conferred upon the Secretary. *United States* v. *Hastings*, 296 U. S. 188, 199.

As in the case of respondent's argument on the matter of conflicting rate regulation, already discussed, the respondent's argument on the point under present consideration is built upon a hypothetical case of the most imaginative character. It actually requires that there be a coincidence of five assumptions in order to produce a "conflict" between federal and state control, indicating the lengths to which respondents were forced to go in order to make out a case. What has heretofore been said in this brief, respecting a similar attempt to establish "conflict" in the matter of rate regulation, and the *Allen-Bradley* and *Terminal R. Association* cases there cited, are equally applicable here. What is said in the next section of this

brief, regarding the policy and objectives of the federal act, still further establishes the invalidity of respondents' argument.

The Rice complaint asks for investigation and regulation of the respondents' contracts with affiliates and other utilities, and of the respondents' security issues. The state commission has express statutory authority to do this. The Secretary does not. It is an understatement to say that conflict between the federal and state agencies as to these matters is "reconcilable" when, in fact, such conflict is non-existent.

Summary on the question of conflict between federal and state statutes.

As indicated at the beginning of this section of the brief, no attempt is made herein to discuss the question of conflict with reference to each and every provision of the Illinois statute invoked by Rice, since lack of conflict as to any single item of the complaint would call for reversal.

Accordingly, we have discussed the question of conflict with respect to those items of the Rice complaint which may be regarded as of foremost importance, namely, the items pertaining to unjust, unreasonable and discriminatory rates; discriminatory and preferential warehousing practices; grain dealing by a public warehouseman; supervision of contracts with affiliates and other public utilities, and supervision of issuance of securities.

It is submitted that, as to each of these matters, analysis of the federal act and regulations fails to disclose any basis for conflict. Respondents invite the Court to search for conflict not plainly apparent in the act itself, but found only in elaborate hypothetical cases purposely designed to produce that result. However, the Court has already indicated, in another warehouse case only recently decided, the hesitancy which it has, in cases of this character, to look beyond the actual words of the statute. Said the Court, in *Davies Warehouse Co.* v. *Bowles, supra*, page 152:

"... Where Congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision ..."

III.

The Illinois Statutes Regulating Warehouses Do Not Infringe the Policy of the United States Warehouse Act.

In the foregoing section of this brief it has been shown that at least as to several provisions of the Illinois Constitution and statutes invoked by Rice, there is no irreconcilable conflict with the particular provisions of the United States Warehouse Act.

But it is contended that, even where there is no direct conflict of particular provisions, if the state statutes "plainly and palpably" infringe the policy of the United States Warehouse Act, to use the language of *Southern Pacific Co.* v. *Arizona, supra,* supersedure may nevertheless occur. Conceding the correctness of this view, it is submitted that no infringement of Congressional policy can be shown in this case.

If the United States Warehouse Act, although not occupying the whole field of warehouse regulation, manifests the plain intent of Congress that the unoccupied portion of the field should remain unregulated, then the Illinois statutes, operating in the federally-unoccupied field, could be said to infringe the policy of the federal act.

To determine whether Congress had any such intent it will be necessary to examine the federal act and its 1931 amendment in some detail. But at the outset it should be borne in mind that, as a general rule, the failure of Congress to occupy the entire field is not to be taken as an intention to require that the unoccupied portion remain unregulated, and so to preclude all state authority.

No better illustration of this principle can be found than the situation dealt with in *Kelly* v. *Washington*, 302 U. S. 1. There the federal government had provided comprehensive and detailed regulation of steam vessels, including the in-

spection of hulls and machinery. But with respect to motor-driven tugs, federal regulation was much more limited and made no provision for such inspection. The question was whether the federal statutes are to be construed as implying a prohibition of inspection by state authorities of hulls and machinery of motor-driven tugs operating in interstate and intrastate commerce in navigable waters adjacent to the State of Washington.

Holding that no supersedure is to be implied in a case of this kind, this Court said:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases (Simpson v. Shepard) . . . States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police-power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently staid together.'" (page 9)

The *Kelly* v. *Washington* opinion then illustrates the principle announced above, by referring to several decisions where State regulatory statutes had been upheld, although federal control existed in the same field. The cases cited by the Court[6] happened to involve the State statutes

[6] *Reid* v. *Colorado*, 187 U. S. 137; *Savage* v. *Jones*, 225 U. S. 501; *Mintz* v. *Baldwin*, 289 U. S. 346.

designed to safeguard the public health. But, indicating that the principle is not at all limited to cases of this type, the Court said:

> "The application of the principle is strongly fortified where the State exercises its power to protect the lives and health of its people. But the principle is not limited to cases of that description. It extends to exertions of state power directed to more general purposes. Thus it was applied in sustaining the order of a state commission requiring interstate carriers to construct a union passenger station as against the contention that Congress had occupied the field—in view of the broad sweep of the Act conferring authority upon the Interstate (Commerce) Commission to deal with the operation of interstate railroads—as it was found that Congress had not authorized the Commission to meet the public need in the particular matter in question. Atchison, T. & S. F. R. Co. v. Railroad Commission, . . . (283 U. S. 391) . . . ." (page 13)

The federal act as originally enacted, was not intended to supersede all state regulation.

It is not understood that respondents contend, or the Court below held, that the United States Warehouse Act, as originally enacted, operated to supersede state authority, in view of the express reservation of state authority contained in section 29 of the original act. Rather, it is their view that the 1931 amendment of that section, by withdrawing that reservation, and inserting language designed to safeguard federal authority, changed the situation and brought about complete supersedure. The merits of this view cannot be appraised without a full understanding of the general scope of the federal act. It is therefore necessary, even though there be no controversy as to supersedure under the original form of the act, to thoroughly analyze the purposes and objectives of the original act.

Examination of the general scope and objectives of the United States Warehouse Act, as enacted in 1916, reveals no Congressional intent to effect supersedure of all state

warehouse regulation. The purpose of Congress at that time was to make it possible, through a federal system of warehouse receipts, to utilize stored agricultural products as a sound, nationally recognized source of credit. The act contains every necessary provision to accomplish this result. It contains nothing which is irrelevant to that objective.

Of the thirty sections of the act, ten contain express provisions relating to warehouse receipts.[7] The machinery set up to assure the soundness of such receipts consists principally of a system of licensing warehouses and persons engaged in classifying, grading, or weighing products stored in licensed warehouses. To assure the effectiveness of the licensing system and the soundness of the warehouse receipts issued by licensees, the act specifically provided for:

(1) The investigation of warehousing practices generally; inspection of warehouses operated by applicants for licenses and by licensees; determination of the suitability of warehouses for storage of agricultural products; classification of warehouses; and prescription of the duties of licensed warehousemen with respect to care and responsibility for agricultural products stored therein. (Sections 3, 24)

(2) The issuance of licenses and the term and renewal thereof. (Sections 4, 5, 9, 11) The suspension and revocation of licenses, for violation or failure to comply with the statute or rules and regulations, or upon the ground that unreasonable or exorbitant charges have been made for services rendered. (Sections 12, 25.)

(3) The filing of bonds, action on bonds and designation of bonded warehouses. (Sections 8, 25)

(4) The duty of licensed warehousemen to receive agricultural products for storage, without making any discrimination between persons desiring to avail themselves of warehouse facilities. (Section 13) The inspection of stored products, the establishment of stand-

[7] Sections 2, 9, 16, 17, 18, 20, 21, 22, 23, 30.

ards for agricultural products, and the mingling of products stored. (Sections 15, 16, 19) The assessment of inspection and license fees, and disposition of moneys. (Section 10) The application of the act and the rules and regulations, to all deposits of agriculture products in licensed warehouses. (Section 14)

(5) The issuance of warehouse receipts, the contents thereof, cancellation of receipts, and records of receipts. (Sections 17-20, 22, 23)

(6) The condition of delivery of stored products and records of products stored. (Sections 21, 23) The publication of findings as to non-compliance by licensed warehousemen; publication of the results of general investigations; and publication of lists of licensed warehousemen. (Section 26) The examination of books, records, papers, and accounts of licensed warehousemen. (Section 27)

(7) The promulgation of rules and regulations.

(8) Cooperation with State authorities, and construction of act so as not to impair State laws. (Section 29—later amended, as hereinafter noted)

(9) Punishment for violations and reimbursement for conversion. (Section 30)

(10) General provisions, such as title of act (Section 1); definitions (Section 2); employment of assistance (Section 31); severability clause (Section 32); and reserving the right to amend (Section 33).

It will be observed that each and every provision summarized above is pointed solely to the achievement of a workable federal warehouse receipt system—and to nothing else. To make it possible to control the issuance of this class of receipts, a licensing system is imperative. To assure the integrity of the receipts, provision is made for inspection, bonding, records and penalties. To limit the benefits of the act to those who are equitably entitled thereto, the privilege of being a licensee is confined to those who charge reasonable rates, and a duty is placed on such persons to receive grain for storage without discrimination.

That the United States Warehouse Act, as it was enacted in 1916, was strictly a warehouse receipt and licensing act is also apparent, when attention is called to the usual and important features or general regulatory statutes which are not to be found in this federal act or in the rules and regulations promulgated thereunder. For example, the Illinois Public Utility Act, which Rice sought to invoke in this case, contains the following provisions considered vital to any general regulatory act, yet wholly missing from the United States Warehouse Act:

(1) Providing that all rates and charges shall be just and reasonable, and prohibiting, and declaring unlawful, every unjust or unreasonable rate or charge. (Section 32) (Comparison between the rate provisions of the Illinois statute, and those of the federal act is fully discussed in the preceding section of this brief.)

(2) Providing for suspension and investigation of rate changes. (Section 36)

(3) Prohibiting rebates and refunds. (Sections 37, 39)

(4) Forbidding rate discriminations. (Sections 37, 38)

(5) Providing for the prescription of rates by the regulatory agency. (Section 41)

(6) Reparations for overcharges. (Section 76)

(7) Supervision of contracts between public utilities, of control of one utility by another, and of sale or encumbrance of utility property. (Section 27)

(8) Regulation of the issuance of securities. (Sections 21, 23)

(9) Supervision of mergers, consolidations and reorganizations. (Section 22)

(10) Control over the payment of dividends. (Section 27a)

(11) Authority of the regulatory commission to ascertain the value of the utility property. (Section 30)

(12) Supervision over additions, improvements, new construction. (Sections 50, 56)

(13) Procedural powers, such as provision for investigation and hearing (Sections 64, 69); complaints and notice (Section 68); attendance of witnesses and depositions (Section 66); issuance of order, record, and judicial review (Section 69). (Note: Section 24 of the federal act provides briefly for hearings in cases of non-compliance by warehousemen, but limiting the Secretary of Agriculture to the right to "publish his findings." Section 25 also provides for hearings prior to revocation or suspension of licenses.)

Not all state regulatory acts applicable to warehouses contain all the provisions, absent from the federal act, which are listed immediately above. But the majority of them contain most of these provisions, so that it is fair to say that an act which omits all or most of them cannot be classified as a general warehouse regulatory act.

It is therefore clear that, viewing only the broad scope and indicated objectives of the United States Warehouse Act, as originally enacted, it cannot be inferred that Congress intended to occupy the whole field of warehouse regulation. Examination of the individual sections of that act yields further proof that total occupancy of the field was not intended, and that continued administration of state warehouse regulatory statutes was anticipated.

For example, Section 18 provides that "unless otherwise required by the law of the state in which the warehouse is located" a warehouse receipt issued for other then fungible products, may omit compliance with sub-paragraph (g) of that section. Likewise, Section 20, relating to issuance of further receipts, calls for "compliance with the laws of any state applicable thereto . . . " It is difficult to see how these provisions could be deemed compatible with a Congressional intention to wholly preempt the field of warehouse regulation.

In view of the general scope of the act, and the significance to be attached to the individual sections referred to

above, no legislative declaration was needed to protect the states from supersedure as to those areas of warehouse regulation where no conflict with federal regulation or policy occurred. The states were adequately safeguarded, as to these areas, by the general principle of statutory construction that, in the absence of express language, the intention of Congress to supersede state authority will be inferred only where there is an irreconcilable conflict or direct and positive repugnance between the federal and state legislation.

But Congress apparently desired to go beyond this, by expressly reserving state authority even in those areas where there would be direct conflict between federal and state action. So Congress provided, in the original form of Section 29 that:

> ". . . nothing in this Act shall be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses, warehousemen. . ."

This abnormal reservation of state authority was withdrawn in 1931, when Section 29 was amended, as will be later noted. Accordingly we do not rely upon this provision as affording any present safeguard to the states. We point out, however, that since the provision was not needed to safeguard state authority in the unoccupied portion of the field, and was not designed for that purpose, its later repeal cannot be taken as an expression of Congressional intent to supersede the states in that unoccupied field.

Section 29 of the original act contains another provision which furnishes the clinching proof that the United States Warehouse Act, as originally enacted, was not intended to preempt the field. This provision reads as follows:

> ". . . the Secretary of Agriculture is authorized to cooperate with such officials as are charged with the enforcement of such State laws in such States and

through such cooperation to secure the enforcement of the provisions of this Act. . ."

As more fully shown at a later point in this brief, this provision constitutes direct recognition that both the federal government and the states may regulate the same warehouseman—a federally licensed warehouseman.

If there could be any doubt that the original act was intended only as a warehouse receipt act, and not as a general regulatory statute, that doubt would be resolved by reference to the legislative history. The House Report favorably reporting H. R. 9419—64th Congress, which became the United States Warehouse Act, contains this explicit statement of the purpose of the act:

> "The essential purpose of this bill is to provide machinery by which farm products may be brought into the most intimate contact with the commercial and investment banking world. Farm products of staple and nonperishable character, such as cotton, grain, wool, tobacco, and the like, undoubtedly furnish the very best security for procuring credit, for these products are the most accurate and unvarying barometers of the country's prosperity as well as indispensable factors in its physical existence and activity. Notwithstanding this fact, collateral based upon farm products affords only a most indifferent basis of credit, being rated, as it were, as of secondary strength. . . . We are seeking in this bill to put farm products in such position that they may assert their full value and strength, and this can be done only through a system which assures to the investor their quality, quantity, and safekeeping and at the same time affords him an investment which is readily negotiable." (H. Rept. 60, 64th Cong., 1st Sess., Jan. 21, 1916, page 2)

Regarding the intention of Congress, in 1916, to safeguard state jurisdiction, Congressman Lever made this statement on the floor of the House during consideration of H. R. 9419:

> "I wish also to point out very distinctly that the system proposed here can not interfere with any sys-

tem organized under State or local authority. I recognize the value of State and local systems of warehousing farm products and I would not in the least hamper them. I believe emphatically that there is ample work for both systems to do and that the two will quickly harmonize their efforts and aims." (Cong. Rec. Vol. 53, pt. 6, April 11, 1916, page 5925)

It is especially important to observe that, in the legislative history of the original act, and also of the 1931 amendment, as will presently be shown, no mention is made of the need to protect the public from unjust, unreasonable, or discriminatory storage rates; prejudicial and preferential warehousing practices; or any of the other undesirable results which develop when a public utility industry goes unregulated. Patently, Congress was not thinking of these things nor directing its legislation to those ends, but rather to the single subject repeated over and over again—establishing warehouse receipts which will have collateral value.

From what has been said above we respectfully submit that, entirely apart from the provision of section 29 expressly reserving all state jurisdiction, the original form of the United States Warehouse Act was not intended, and did not operate, to preclude all State regulation of federally licensed warehousemen. We come, then, to the 1931 amendment, chiefly relied upon by respondents as evidencing a Congressional intention to effectuate complete supersedure.

The 1931 amendment did not change the basic intention of Congress but was only meant to strengthen federal administration in the limited field covered by the original act.

Aside from a number of minor changes of no relevancy here, the 1931 amendment revised only sections 6 and 29 of the act. The most important of these is the revision of section 29. In its original form, as indicated above, this section reads as follows:

"*. . . nothing in this Act shall be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses, warehousemen* . . . but the Secretary of Agriculture is authorized to cooperate with such officials as are charged with the enforcement of such State laws in such States and through such cooperation to secure the enforcement of the provisions of this Act. . . ."

The 1931 amendment changed this to read:

"In the discretion of the Secretary of Agriculture he is authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, warehousemen, weighers, graders, inspectors, samplers, or classifiers; *but the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this chapter shall be exclusive* with respect to all persons securing a license hereunder so long as said license remains in effect. . . ."

It will be observed that this revision of section 29 leaves the provision relative to cooperation with state officials substantially as it was before. But the provision of the original act expressly reserving state authority, shown in italics, has been replaced with a provision, also shown in italics, stating that the power, jurisdiction, and authority conferred upon the Secretary under the chapter "shall be exclusive."

It has already been shown that the omitted provision was not needed to safeguard state jurisdiction as to those phases of warehouse regulation not expressly covered by the federal act. It was designed, rather, to extend the reservation of state authority to cases of actual conflict. It developed as will later be shown by reference to the legislative history, that this unusual extension of state authority interfered with proper administration of the federal act. Congress accordingly removed this provision from the act and provided that the power, jurisdiction, and authority conferred upon the Secretary "under this chapter (the entire United States Warehouse Act) shall be exclusive."

The 1931 amendment did not confer upon the Secretary, any additional "power, jurisdiction, and authority." The general provisions of the act and the specification of the Secretary's powers and duties remained what they had always been since the original enactment in 1916. Hence the federal "power, jurisdiction, and authority" which became "exclusive," under the 1931 amendment, was the limited power, restricted jurisdiction, and circumscribed authority which had always been exercised. The act was still a warehouse receipt act—the Secretary was still without any "power, jurisdiction, or authority" in the general field of warehouse regulation.

How, then, can it be said that the 1931 amendment of section 29 operated to preempt the entire field of regulation as to warehousemen holding federal licenses?

When it is said that the Secretary has "exclusive" power in a certain field, that implies not only that others are precluded from exercising power in that field, but that the Secretary *does have* power in that field. But the Secretary has never been given any power, jurisdiction, or authority with respect to 13 specific features of the Illinois Public Utility Act, as heretofore indicated.

Accordingly, as to those 13 features, the Secretary's power, being non-existent is certainly not "exclusive," and the term "exclusive" cannot, therefore, operate to exclude state jurisdiction as to those matters.

That Congress contemplated continuance of state regulation also seems evident from the fact that section 29, as amended, still contains the provision for cooperation:

> "In the discretion of the Secretary of Agriculture he is authorized to cooperate with State officials charged with the enforcement of *State laws relating to warehouses*. . . ."

Obviously the only area where cooperation would have any bearing upon the purposes and objectives of the federal act is with respect to regulation of federally-licensed warehouses. As to warehouses not licensed under the fed-

eral law, the Secretary has no powers or duties, and hence no purpose in cooperating with state officials. From this it appears clear that Congress assumed that non-conflicting state regulation of federally-licensed warehouses would continue. To make certain that the dual regulation works harmoniously and effectively, and to advance the general objectives of the federal act with respect to such warehousemen, the cooperation provision was continued in effect.

As this Court recently said, in *Union Brokerage Company* v. *Jensen*; 322 U. S. 202, holding that a state may require a federally-licensed customhouse broker to obtain a license as a foreign corporation:

> ". . . Where the Government has provided for collaboration the courts should not find conflict. See Savage v. Jones, 225 U. S. 501, . . . and Kelly v. Washington, 302 U. S. 1. . . ." (page 209).

Likewise in *Townsend* v. *Yeomans*, 301 U. S. 441, the Court indicated the significance it attaches to provisions calling for cooperation with state officials when it said, referring to the Federal Tobacco Inspection Act:

> ". . . Instead of frustrating the operation of such state laws (Georgia law fixing maximum charges for handling and selling leaf tobacco), the provisions of the Act expressly afforded and emphasized the opportunity for cooperation with the States in protecting the farmers' interests. In this view we find no ground for the contention that Congress has taken possession of the field of regulation to the exclusion of state laws which do not conflict with its own requirements." (page 454).

The legislative history of the 1931 amendment of section 29 reveals that the limited purpose of the revision was to eliminate federal subjection to state authority in cases of actual conflict. It also furnishes additional evidence that the prime purpose of the entire act was not general regulation of warehouses, but to convert farm products into col-

lateral value through a system of federal warehouse receipts.

The House Committee, in favorably reporting H. R. 7—71st Congress, containing the 1931 amendments, said:

> "Under section 29 of the law as at present, if the Federal act in any way conflicts with the State law, the Federal law becomes subservient to the State law in so far as there is a conflict. The result is that the Federal law can be negatived by State legislation. This condition has worked against Federal warehouse receipts attaining that degree of usefulness for collateral purposes in the financing of agricultural products which Congress had intended they should attain. Bankers generally have recognized the worthy purposes of the warehouse act, but when they are approached to loan large amounts they view section 29 of the present law with considerable misgiving. To make the law accomplish the real purpose of Congress, it should be independent of any State legislation on the subject. The amendments proposed to section 29 of this bill aim to make the Federal Warehouse Act stand on its own bottom." (House Report 4—71st Cong., 1st Sess., May 1, 1929, page 4)

Continuing, the House Report says:

> "It is believed that the amendments embodied in this bill will give the warehouse receipts issued under the Federal warehouse act such collateral value as to command the confidence of all bankers and will place this law on a firm foundation. . . . " (House Report 4, page 5)

The Senate Committee, favorably reporting the same bill, said:

> ". . . Since the law specifically makes the Federal act subservient to State laws in case of conflict, this feature militates against the full value of Federal warehouse receipts for collateral purposes. The amendment proposed to this section would make the Federal act independent of State laws. In other words, it would place the Federal act on its own bottom. It does not change the permissive feature of the Federal act. No ware-

houseman is obliged to operate under the Federal act. The amendment merely leaves the choice to warehousemen and their patrons as to whether or not a warehouse shall be operated under the Federal act, and if it is decided to secure a license under the Federal act then the warehouseman would be authorized to operate without regard to State acts and be solely responsible to the Federal act. Bankers have repeatedly pointed out that this section of the warehouse act is its weakest feature. The amendment will clarify and remove many uncertainties from the credit mans viewpoint. As the law now reads, for fear the Federal act may be negatived by State legislation or regulation; a banker is obliged to follow closely the laws of the 48 different States, the regulations thereunder, and the administrative rulings thereunder. This is an impossible task. The suggested amendment will place the Federal act independent of State acts and should enhance the value of receipts for collateral purposes. Again, this amendment is in harmony with the policy laid down in the national banking act. In other words, it leaves it with the warehousemen to decide whether they wish to operate under the State or Federal law and having made their choice they shall then be permitted to operate without interference on the part of any agency." (Senate Report 1775—71st Congress, 3rd Sess., Feb. 17, 1931, page 2)

It will be noted that both of these committee reports refer to the "conflicts" with state law—not to state regulation in the area untouched by the federal act. Where actual conflicts develop they had been resolved, in the past, by making the federal act give way to state authority. But, as explained in the House report, "This condition has worked against Federal warehouse receipts attaining that degree of usefulness for collateral purposes in the financing of agricultural products which Congress had intended they should attain." So the amendment was designed to remedy this defect by making the federal act supreme in case of conflicts, but did not operate to extend federal jurisdiction to, or exclude state jurisdiction within, the general field of warehouse regulation not directly related to the federal warehouse receipt and licensing system.

The limited purpose and effect of the 1931 amendment, as shown by these committee reports, is further demonstrated by the statement made by Congressman Clark of New York, floor manager on the bill, when the 1931 amendment reached the House. Mr. Clark said:

> "The only section of that bill that should raise any question at all in any member's mind is the Sec. 29 amendment. Under the present law, if the Federal act in any way conflicts with State laws, the Federal act becomes subservient to the State law in so far as there is conflict. The result is that the Federal law can be negatived by State legislation. This condition has put a severe limitation at times on Federal warehouse receipts attaining that degree of usefulness that they should have and that the Congress intended that they should have for collateral purposes. In fact, this very limitation can defeat the very intent of Congress and render worthless as collateral the receipts issued under the law. Any clause or phrase in the law which raises a doubt in the banker's mind about the receipts cast a cloud on their collateral value. *As the one big purpose of the Warehouse Act was and is to convert the farm products into collateral value*, and as this act during the past ten years has proved its value to the farmer and his cooperative associations, we should not hesitate to perfect it and make the warehouse receipts issued thereunder above suspicion." (Vol. 72, Cong. Rec. Pt. 8, p. 8530, H. R. 7.)

This 1931 amendment of section 29 has been considered by the Courts in two cases presently to be noted.

The Supreme Court of South Dakota, in *In Re Farmers Cooperative Assn.*, 8 N. W. 2d 557, held that the United States Warehouse Act was designed to provide for the licensing of warehouses for the storage of agricultural products intended for interstate shipment, as well as those actually in course of such shipment, and that a warehouseman, licensed under that Act was exempt from the requirement of a state law that he obtain a state license. That case involved only the question whether the warehouseman must obtain two licenses. The question whether the United

States Warehouse Act precludes the exercise of state power in the general field of warehouse regulation was not discussed.

In the course of its opinion the South Dakota court considered section 29, as amended, and reached this conclusion:

> "We interpret this as a clear grant of discretionary power to the Secretary of Agriculture, to achieve the congressional aim either through cooperation with state officials in promoting state regulation, or by direct federal control. When the latter course is followed both by reason of the terms of the act, and the paramount nature of federal power, the federal control displaces state control." (Page 562)

That the South Dakota court misconstrued the concluding words of section 29 of the United States Warehouse Act, in holding that those words operate to vest in the Secretary jurisdiction exclusive of all state jurisdiction whatsoever over warehouses licensed under the act, seems plain from the decision of this Court, in *United States* v. *Hastings*, 296 U. S. 188, decided in 1935, dealing with those very concluding words of that section.

In the *Hastings* case, the question was involved whether the provisions of section 30 of the act, making it a penal offense to remove "from a licensed warehouse" contrary to the provisions of the act, "any agricultural product stored. . . . for which licensed receipts have been or are to be issued," were applicable to a theft from a licensed warehouse of agricultural products stored therein, and covered by a receipt issued in the form required by the Act, when it was not shown that the agricultural products stolen were stored for interstate commerce. The Court held the provisions of section 30 inapplicable in such case.

Considering the effect of the words in section 29, "the power, jurisdiction and authority conferred upon the Secretary of Agriculture under this chapter shall be exclusive with respect to all persons securing a license," the opinion, written by Chief Justice Hughes, states:

". . . . The Act is not limited to one section of the country, or to particular market conditions, but applies generally to warehouses for these varied commodities. . . . And *Congress could not fail to have in mind that there were warehouses in many States, operating under state laws* and serving local demands in intrastate transactions; receiving for storage and issuing receipts for agricultural products in connection with enterprises and trade that are entirely local.

"It would need stronger evidence than this Act affords to justify the conclusion that Congress intended that warehousemen, in taking advantage of the federal statute and in issuing warehouse receipts as required by its terms, should submit to federal control the deposit of products and the issue of warehouse receipts in the course of their local business where the products were not stored for interstate or foreign commerce. Despite the broad language of certain sections of the Act, we think that (aside from places within the exclusive jurisdiction of the United States) the limitation to storage for interstate or foreign commerce is dominant. . . . The amendment of 1931 with respect to conflict with the operation of state laws does not militate against this limitation, for while the amendment asserts the exclusive authority of the Secretary of Agriculture, *it has relation to the authority conferred by the Act*, and the definition in the original act of the warehouses which may be licensed and the provision of section 259 (section 17) as to the products for which warehouse receipts are to be issued, were left unchanged by the amendment." (page 198).

To the extent that *the Act gives authority to the Secretary*, it was the purpose of the 1931 amendment to make the jurisdiction of the Secretary exclusive, but, as to those matters concerning which the Secretary has *no* authority, the amendment, as the *Hastings* decision points out, leaves state authority unaffected.

The *Hastings* case dealt only with the question of whether the act gave the Secretary any authority with respect to intrastate commerce, and concluded that it did not. Because of this, the Court below concluded that the case has

no bearing here. But this overlooks the fact that the reasoning of the *Hastings* opinion is as applicable to the disputed areas of regulation involved in the instant case as to the disputed area (interstate versus intrastate commerce) involved in the proceeding. If, as Chief Justice Hughes points out, the provision that the Secretary's power shall be exclusive, "has relation to the authority conferred by the Act," then it is obvious that it has no relation to the numerous provisions of the Illinois Public Utility Act not touched upon by the federal act or regulations thereunder, as listed above.

In addition to the amendment of section 29, the amendatory act passed in 1931, revised section 6 of the United States Warehouse Act, relating to the filing of bonds. In its original form, section 6 required that federal licensees give a bond "to secure the faithful performance of his obligations as a warehouseman *under the laws of the state, district or territory* in which he is conducting such warehouse, as well as under the terms of this Act, and the rules and regulations prescribed hereunder. . . ." The 1931 amendment, eliminated the requirement that the bond be conditioned upon compliance with the laws of the state, district or territory in which the warehouse was conducting business, and left only that provision requiring the bond to be conditioned upon compliance with the Federal act and federal regulations thereunder.

Respondents contended, in the Court below, that this revision of section 6 "is consistent only with the purpose and design of Congress to give effect to the amendment to Section 29, whereby exclusive control over federally licensed warehousemen was vested in the United States Agency."

But the action of Congress, as revealed by the House and Senate reports, was not taken in contemplation of total supersedure of state authority, as respondent implies. The exact reverse of this is true, for this change was actually made in contemplation that *state laws would continue in effect* and might be the cause of exhausting the federal

bond to take care of claims under the state law. Whereas Congress could have expressly exempted warehousemen from liability under state law, it chose, instead, to recognize continued application of the state law but, for reasons stated in the Committee Report, to relieve the federally-filed bond from liability under such state statutes.

> "The next amendment eliminates from section 6 of the present act the clause which provides that the bond shall secure the faithful performance of the warehouseman's obligations as defined by State laws. *Since the act does not give the department jurisdiction to enforce State laws, it is obviously unfair that a bond should be exacted of a warehouseman to satisfy State laws.* Such a requirement subjects the bond to greater exposure of liability and naturally such increased exposure is reflected in the rates charged for bond premiums. Moreover, *if the bond is available under State acts* this may result in taking away from Federal receipts some of the very best security that the Federal act contemplates shall be available for their protection. Again this amendment to section 6 naturally follows the amendment suggested to section 20." (Senate Report 1775—71st Cong., 3rd Sess., page 2)

The point which respondent here tries to make is also obviously met by the fact that the 1931 amendment did not remove from the act two other references to state laws, contained in sections 18 and 20, as heretofore noted.

Summary on the general scope and policy of the federal act.

The limited nature of the United States Warehouse Act has been well summarized in these words by Professor John H. Frederick, Professor of Transportation and Industry, The University of Texas:

> "The United States Warehouse Act, which became a law on August 16, 1916, is primarily a licensing device. It provides for the licensing and the bonding of public warehouses storing certain agricultural products under

conditions intended to establish the integrity of their warehouse receipts and to make these receipts generally acceptable as security for loans." (Public Warehousing, John H. Frederick, The Ronald Press Company, 1940, page 228)

This Court has heretofore recognized that the United States Warehouse Act is restricted in its application. This is evidenced not only by what the Court said in the *Hastings* case, supra, but also by what it said in *Townsend* v. *Yeomans*, 301 U. S. 441, sustaining a Georgia statute fixing maximum charges for handling and selling leaf tobacco. Holding that this state statute had not been superseded by the Federal Tobacco Inspection Act, the Court said:

> "Even where the Federal Government has intervened, as in the United States Warehousing Act of August 11, 1916, 7 U. S. C. A. Chap. 10, in providing for licenses for warehouses where agricultural products are 'stored for interstate or foreign commerce,' we held that the license did not convert the warehouseman into an instrumentality of the Federal Government, and, while by means of the licensing provisions *a measure of control* over those engaged in the business was secured to the national government, still the license did not confer upon the warehouseman immunity from state taxation. Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 22, 23. . . ." (page 457)

The *Federal Compress* case, referred to in the *Townsend* decision, was decided prior to the 1931 amendment. But it has already been shown that this amendment did not enlarge the Secretary's regulatory jurisdiction in any respect. Consequently, the statement that the federal act affords only "a measure of control," is as valid today as when the *Federal Compress* decision was rendered.

In view of the limited scope of the federal act, the State regulatory statutes cannot be said to infringe upon the policy of Congress, and the two can consistently stand together. As was said by this Court, in *Allen-Bradley Local*

v. *Wisconsin E. Rel. Bd.*, supra, in upholding a state order made under a state employment peace act as not repugnant to the provisions of the National Labor Relations Act:

> ". . . Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained under the rule which has long obtained in this Court. See Sinnot v. Davenport, 22 How. (US) 227, 243. . ." (page 751)

And finally, in considering this whole question of state infringement upon a policy of Congress, great weight must be given to the fact that we are here dealing with a long-exercised function of state government. That this factor is entitled to evaluation in deciding the question of supersedure is plainly indicated by what was said in *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144. It was there said:

> ". . . It is a much more serious thing to adopt a rule of construction, as we are asked to do here, which precludes the execution of state laws by state authority in a matter normally within state power. . . ." (page 155)

In view of the foregoing discussion we submit that the United States Warehouse Act, as it exists today, is operative in a comparatively narrow field; that it was not intended, and is not administered as a general regulatory act; that it manifests no Congressional intent that federally-licensed warehousemen should escape general state regulation as to matters not expressly covered by the federal act; and that accordingly the state regulatory statutes here in question do not "plainly and palpably" infringe the policy of the United States Warehouse Act.

IV.

Supreme Court Cases, Holding that Supersedure Has Occurred, Distinguished.

Most Court decisions favoring federal preemption involves matters which, unlike warehouse regulation, have been customarily controlled at the national level. Where preemption has been found in a field theretofore open to state regulation, this has been due to a conflict of precise regulations or a clash between the policy of the federal and state acts, both of which, is is submitted, are lacking in the instant case.

Thus the early case of *Prigg* v. *Commonwealth of Pennsylvania*, 41 U. S. (16 Pet.) 539, relied upon so heavily by respondents in the Court below, involved the validity of an 1826 Pennsylvania criminal statute under which Edward Prigg was convicted for seizing a fugitive slave and returning her to Maryland. The Court, in setting aside the conviction, pointed to Article IV, Section 2 of the Constitution, relating to fugitive slaves, and to the Act of Congress of the 12th of February, 1793, respecting fugitives from justice and persons escaping from the service of their masters.

Here was a matter expressly dealt with in the Constitution and concerning which Congress had acted in 1793, 31 years before the Pennsylvania statute was enacted. There was no tradition of state control in this field—on the contrary, the federal government had assumed control from the beginning. In this setting the Court concluded that the states were without power to complement federal legislation.

Respondents also relied, in the Court below, on a series of railroad cases as supporting their contention that the states could not supplement federal regulation established by Congress in the exercise of its powers under the Commerce Clause. These cases are: *Southern Ry. Co.* v. *R. R. Commission of Indiana*, 236 U. S. 439; *Napier* v. *Atlantic*

Coast Line R. R. Co., 272 U. S. 605; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; and *Charleston and Western Car Railway Co.* v. *Varnville Co.*, 237 U. S. 597.

Where the case involves railroad regulation, the Courts have usually adopted a strict view of state jurisdiction, due to the nature of railroads as instrumentalities of interstate commerce. Consequently, in such cases, it has been easier for the Court to find supersedure than in other regulatory fields more closely identified with the local public interest.

But, actually, the facts in these railroad cases were such that supersedure was called for regardless of the character of the case, since an actual conflict between federal and state regulations was shown to exist, or the delegation of federal power to a federal regulatory agency was sufficiently broad to indicate an intent to accomplish complete supersedure.

Thus, in *Southern Ry. Co.* v. *R. R. Commission of Indiana*, supra, the Indiana statute required railroads to place grab irons and hand holds on the sides or ends of every car, under a penalty of $100 fine. The federal Safety Appliance Act likewise imposed penalties for failing to equip cars with hand holds. Here was a clear duplication on a precise detail of regulation, and necessarily the state regulation had to give way.

Napier v. *Atlantic Coast Line R. R. Co.*, supra, involved the question of an unexercised discretionary power given by Congress to a federal official as a means of regulating interstate commerce, where the full exercise of his authority would conflict with an assertion of the state power. The Boiler Inspection Act there in question did not deal expressly with automatic doors to locomotive fire boxes, or with locomotive cab curtains, which were the subject matter of the Georgia and Wisconsin regulations there in question. But, in view of the broad delegation of power to the Commission, Congress was held to have intended a preemption of the field. As stated by Chief Justice Stone

in his dissenting opinion in *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 171, the question in the *Napier* case was:

> ". . . whether the failure of the federal official to exercise his full power is in effect a controlling administrative ruling that no further regulation by either federal or state government is needful." (page 176)

Needless to say, no such question as this is involved in the instant case.

The third railroad case cited by respondent is *New York Central R. Co.* v. *Winfield*, 244 U. S. 147. There a railroad employee sought to recover from the company for injuries received in an accident not involving negligence by the employer. Compensation was sought under a New York Workmen's Compensation Law which permits recovery in such cases. The Court held that, with respect to railroad employees, this state law was superseded by the Federal Employers' Liability Act. The latter Act provided for employer-responsibility in the event of negligence, but not where negligence is not shown.

The Court concluded that failure of the federal Act to provide for relief in cases not involving negligence indicated an intention of Congress that compensation should not be exacted in such cases. Hence a state statute providing for compensation in such cases would be in direct conflict with the policy of the federal legislation. In reaching this conclusion the Court placed emphasis upon the national characteristics of railroad operations, and the resulting special need for uniformity, saying:

> ". . . whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line. . . . It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. . . . It was drafted and passed shortly following a message from

> the President advocating an adequate national law covering all such injuries, and leaving to the action of the several states only the injuries occurring in intrastate employment. . . ." (page 149)

In the instant case, unlike the *Winfield* case, there is no conflict whatever between state and federal policy; the subject of regulation, warehousing, is not primarily a matter of national interest; and the legislative history, as heretofore noted, indicates no intention of securing national uniformity in the whole field of warehouse regulation.

The final railroad case cited by respondents, in its brief to the Court below, is *Charleston & W. C. Ry Co.* v. *Varnville Furniture Co.*, 237 U. S. 597. There the Court held invalid a South Carolina statute permitting recovery for loss against an interstate carrier even though there has been no showing that the loss happened while the goods were in the carrier's possession, or within the state, or to have been caused by it. The Court held that the state statute "overlaps the Federal Act (Carmack amendment, Act of June 29, 1906, chap. 3591, 34 Stat. 584, 593) in respect of the subjects, the grounds, and the extent of liability for loss." (page 603) Thus, again, supersedure was based upon conflict and repugnance between the federal and state statutes.

In spite of the national character of railroad transportation, however, not all such cases have been decided adversely to the states, the trend in recent years appearing to be against a finding of supersedure. See:

> *Southern Pacific* v. *Arizona*, supra
> *Terminal R. R. Assn.* v. *Brotherhood of Railroad Trainmen*, supra
> *A. T. & S. F. R. Co.* v. *R. Com.*, 283 U. S. 380

As further illustrating the fact that most Court decisions favoring federal preemption have been rendered in cases where the subject of regulation has been customarily one for national control, reference is made to *Hines* v. *David-*

owitz, 312 U. S. 52, also relied upon by respondent. This case held that the Federal Alien Registration Act of 1940 precluded the enforcement of the Pennsylvania Alien Registration Act of 1939. Pointing to the primary national interest in the subject-matter, the Court said:

> "That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787, and has since been given continuous recognition by this Court. . ." (page 62)

It is obvious that supersedure could be established more readily in a case involving international relations, concerning which the national government has always had full and exclusive responsibility, than in a case involving warehousing regulation. As this Court said, in *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, supra, sustaining a Wisconsin employment peace act as not repugnant to the National Labor Relations Act:

> ". . . In the Hines Case a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. . . . Therefore we were more ready to conclude that a federal act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. . . ." (page 749)

The Court decision upon which respondents apparently place chief reliance is *Cloverleaf Butter Co.* v. *Patterson*, supra. Here it was held that federal regulation of the production of renovated butter by a statute taxing such butter and its manufacture; prescribing the conditions under which it is to be made, making provision for its inspection,

and giving power to confiscate the finished product, excludes state power to inspect, seize and detain packing stock butter (from which renovated butter is made) from a manufacturer, part of whose product is sold in interstate commerce.

While the subject-matter of the regulation involved in the *Cloverleaf* case is one which has long been dealt with by the states, the Court, viewing all the facts, concluded that the state regulation here was inconsistent with the regulatory policy declared by the federal statute. "Confiscation by the state of material in production," said the Court, "nullifies federal discretion over ingredients." (page 168)

No similar statement can accurately be made concerning the proposed Illinois regulation of warehouses in the instant case. There is no conflict in policy between the federal and state statutes, as heretofore shown in this brief; and no state regulation would have the effect of nullifying any federal discretion vested in the Secretary of Agriculture.

That the *Cloverleaf* case represents about the farthermost point the Court has indicated a willingness to go in finding supersedure is indicated by the fact that the case turned on a five to four decision and that the essence of the views expressed in the dissenting opinion of the Chief Justice (and much of the exact language) became the majority opinion of the Court in *Penn Dairies* v. *Milk Control Com.*, supra, decided a year later. In this latter case, in holding against nullification of a state statute, the Court said:

> ". . . An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication; United States v. Borden, 308 U. S. 188, 198, 199. . . . United States v. Jackson, 302 U. S. 628, 631, . . . Posadas v. National City Bank, 296 U. S. 497,

503-505, . . . should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation." (page 275)

". . . Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." (page 275)

The latest Supreme Court decision cited by respondents, in their brief to the Court below, is *Hill* v. *Florida*, 325 U. S. 538. The Court held that a Florida statute requiring a license for business agents of labor unions and prescribing their qualifications, is invalid as to employees covered by the National Labor Relations Act.

There was no departure from the principle that supersedure occurs only where there is an "irreconcilable conflict." (See page 539 of opinion) Applying that principle, the Court found that section 4 of the Florida Act circumscribes the "full freedom" of choice which the federal act expressly guarantees. The Court in the *Hill* case also found that the penalty provisions in section 6 of the Florida Act, relating to licenses, "brings about a situation which is inconsistent with the federally protected process of collective bargaining." (page 543) On this the Court said:

"Section 6, as here applied, stands no better (than section 4). The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union. . . ." (page 543)

There are no guarantees in the United States Warehouse Act which would be in the slightest affected by the state

regulation here in question. As will be later shown, that Act was designed primarily to protect those who deal in warehouse receipts. The state regulation does not interfere with that purpose. Applying the exact rule announced in *Hill* v. *Florida*, there is here no "irreconcilable conflict between the federal and state warehouse acts."

CONCLUSION.

The effect of the decision by the Court below is to strike down every vestige of state regulatory authority, as it may be applied to federally licensed warehousemen. The state authority thus destroyed has been long and widely exercised by the states. The general public interest in preserving this state authority is obvious.

The federal act is neither intended nor administered as a substitute for comprehensive state regulation. It deals with the limited problem of warehouse receipts. Its legislative history is barren of any indication that Congress had general regulatory problems in mind or sought to preclude the states from dealing with such problems. No actual conflict is foreseeable under the issues of this particular case. The possibility of conflict at other times and in other cases is supported only by supposition built upon supposition. Continued exercise of state regulatory authority will interfere with the federal act in no substantial respect.

Measured by the strict tests of supersedure established by this Court, the facts of the case present no justification for this destruction of state authority. Evaluated in terms of the comparative national and local interests, the almost imperceptible and mostly imagined effect of state regulation upon proper administration of the United States Warehouse Act does not merit this blow to the general and local public interest now protected by the state.

The injunction does not give respondents relief from conflicting regulation, but sanctuary from all regulation.

The petition for the writ of certiorari should be granted.

Respectfully submitted,

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